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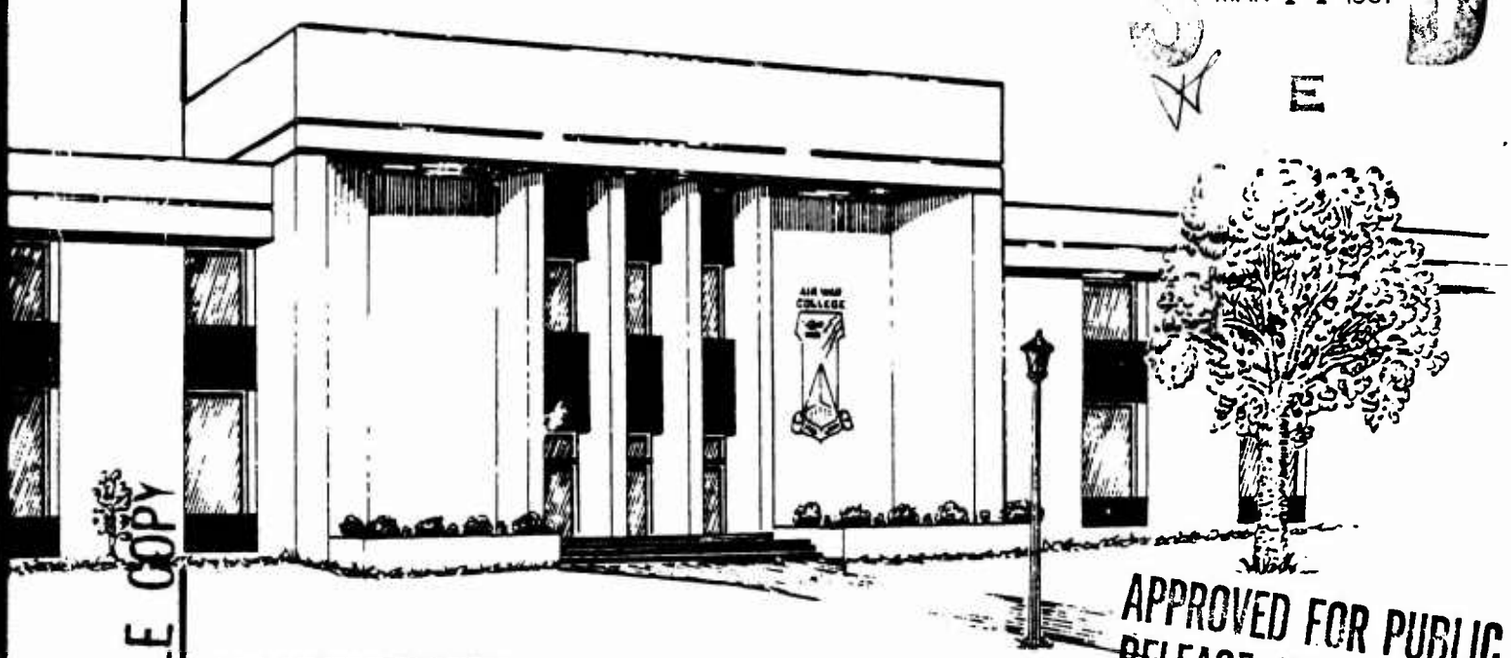
THE ATTORNEY-CLIENT PRIVILEGE IN THE AIR FORCE:
WHO IS THE CLIENT?

By LT COLS WILLIAM R. DUGAN, JR, AND
MICHAEL B. LUMBARD



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UNITED STATES AIR FORCE
MAXWELL AIR FORCE BASE, ALABAMA

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THE ATTORNEY-CLIENT PRIVILEGE IN THE AIR FORCE: WHO IS THE CLIENT?

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REQUIREMENT

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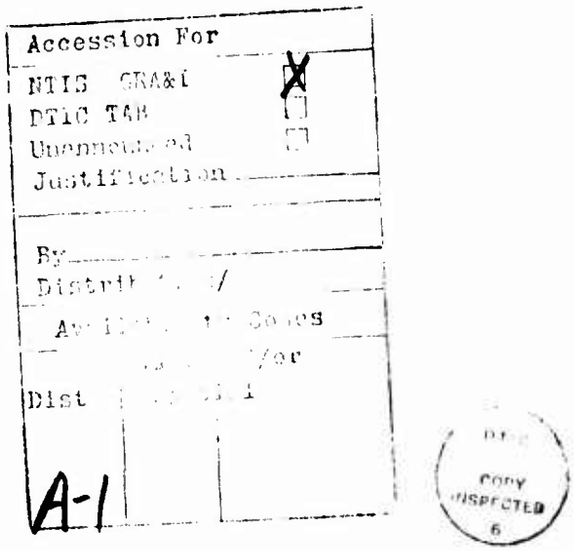

AIR WAR COLLEGE RESEARCH REPORT ABSTRACT

TITLE: The Attorney-Client Privilege in the Air Force: Who is the Client?

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The Air Force staff judge advocate (SJA) is the designated attorney for the command. Does it follow from this that the commander is the staff judge advocate's "client?" If so, then should there not be a communication privilege between these two individuals? In the corporate world, the corporation and not the executive is the staff attorney's client. Must the agency rather than the commander then be the client? If that is the case, should commanders tell their attorneys everything? Can the staff judge advocate function in such a situation and to whom does he owe his loyalty? Air Force regulations and policies are silent on these issues. The authors propose a solution that would better define the commander-staff judge advocate relationship and take the SJA off the horns of an ethical dilemma.

BIOGRAPHICAL SKETCH

Lieutenant Colonel Michael B. Lumbard attended the United States Air Force Academy, graduating with honors in 1967. His initial assignment was to McClellan AFB, California, as a procurement officer. In 1969, he attended Hastings College of the Law, University of California, and received his Juris Doctorate degree in 1972. His assignments include RAF Upper Heyford, United Kingdom, as Deputy Staff Judge Advocate; Karamursel CDI, Turkey, as Staff Judge Advocate; and Headquarters, Air Training Command, as Chief of both the Civil Law and Contract Law Divisions. He came to the Air War College from Castle AFB, California, where he was the Staff Judge Advocate. He attended Squadron Officer School in 1972, Armed Forces Staff College in 1979, and completed Air War College by seminar in 1982. He is a member of the California State Bar.

Lieutenant Colonel William R. Dugan, Jr., attended the University of Florida, graduating in 1968, and was commissioned a second lieutenant through the Air Force ROTC Program. His initial assignment was to Whiteman AFB, Missouri, as a minuteman missile crew member. In 1973, he was assigned to Bergstrom AFB, Texas, as a logistics plans officer. He was selected for the Air Force Funded Legal Education Program in 1974 and attended the University of Kansas School of Law, graduating with a Juris Doctorate degree in 1976. He has had assignments at Little Rock AFB, Arkansas as Assistant Staff Judge Advocate and at Headquarters, United States Air Forces Europe, Ramstein AB, Germany, as Chief of the International Law Division. He came to the Air War College from Fairchild AFB, Washington where he was the Staff Judge Advocate. He attended Squadron Officer School in 1973 and completed Air Command and Staff College by seminar in 1980 and Air War College by seminar in 1983. He is a member of the Kansas State Bar.

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THE ATTORNEY-CLIENT PRIVILEGE IN THE AIR FORCE: WHO IS THE CLIENT?

You are a base staff judge advocate (SJA). One of your primary responsibilities is to provide the base commander and his staff agencies with legal advice and guidance. You receive a phone call that an investigative team is on its way from your numbered air force headquarters to look into management problems at your base air museum. Of interest to the investigators will be decisions made by the base commander, and during their visit they intend to go through your legal files and opinions to him on the subject. They also want to talk to you about the legal advice you gave the commander and the discussions you had with him about the museum. This is a scenario that can and does occur. It poses a real problem to the Air Force attorney.

Normally, an attorney's communications with a client are privileged, meaning that they may not be disclosed under most circumstances without the permission of the client. However, in this scenario, who is the client? Is it the base commander, who routinely needs legal advice in order to execute his responsibilities? Is it the Air Force, which we all serve? Or is it the public, in which case can any citizen have access to your legal files? If the privilege rests with the public, would there be a privilege at all? If it is the Air Force, can any discussions, opinions, or advice given the commander by "his attorney" be withheld

from other officials of the Air Force who have a need to know?

Every staff judge advocate feels loyalty to the individual decision maker who has asked for advice and most often depends and acts upon it. Is it a case where at some point personal loyalty must give way to some higher duty? Many commanders may be under the impression that they have a communications privilege with their staff judge advocate. (A survey conducted by Colonel Barney L. Brannen, while a student at the Army War College, showed that 100 percent of fifty-five general court-martial convening authorities questioned thought that conversations with their SJA's were confidential and privileged.) (16:22) If they are mistaken, should we clarify the ground rules, or are we better off by not asking a question that's too tough to answer? Most critical to the issue is the question: if there is no special privileged relationship between the commander and his assigned staff judge advocate, will the commander be reluctant to share his opinions, doubts and mistakes with his attorney? Will he bare his soul, and if not, can the attorney properly assist him?

The problem involves an ethical dilemma for the staff judge advocate, the answer to which is not now well defined by law, regulation, or even custom. Yet, it is a problem that goes to the very heart of the SJA-command relationship. This paper will discuss the attorney-client privilege in

relation to the modern military organization and attempt to recommend a policy which provides guidance to staff judge advocates and their commanders in the field.

THE PRIVILEGE AND THE PROBLEM

The attorney-client privilege is the oldest evidentiary privilege for confidential communications. (21:1006) It dates back to at least the time of Elizabeth I of England and was formally recognized as early as 1743 in the case of Annesley v. Anglesea. (41:427) Then it was declared that the attorney held the privilege, and as a "point of honor," the attorney's first and foremost duty was to protect his client's confidential communications. (41:429)

Although there is no universally accepted definition of the privilege, Wigmore provides perhaps the most widely cited description:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection be waived. (21:1006)

Rather than protecting the honor of the attorney, the privilege now is recognized as a primary protection of the client's interests. Most important, it encourages full disclosure of all material facts by the client to his counsel. It is recognized by the profession and society that such a restriction on the free flow of information to

the courts and the public promotes much improved legal representation since a well informed attorney can more effectively represent his client. (21:1007) The rule has met the test of time. Very limited exceptions to the privilege exist, for instance, when the communication concerns the commission of a future crime or fraud, or when the client consults the attorney who is acting in some other capacity, such as an accountant. (21:1008) However, under the modern rule, the privilege has been very broadly applied.

Many earlier writers expressed the view that the client must intend the information remain confidential. (21:1008) This is sometimes a heavy burden for the layman to bear. In response, the American Bar Association (ABA) Model Rules of Professional Conduct Discussion states that "the confidential rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever the source." (2:114)

Although well understood in the private sector for many years, only recently has the privilege been defined for the special relationships existing in corporations and in government. This is still an evolutionary area. One such attempt to legislate the privilege involves the release of documents under the Freedom of Information Act (FOIA), which prevents the release of documents that are "intra-agency

memorandum [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency." (5) Air Force Regulation 12-30, paragraph 10e(1), gives as an example of such a document, "Those portions of records which consist of advice, opinions, evaluations, or recommendations the release of which would reveal the deliberative process of the Air Force." The typical legal advice provided the commander would seem to fit into that category. Does not that somehow infer an SJA-commander communications privilege internally? Probabaly not, at least as far as FOIA is concerned.

An important Air Force FOIA case involving the privilege was Mead Data Central, Inc. v. United States Department of the Air Force, where the court stated exclusion from public release existed even when documents are shared among agency attorneys, and includes communications by attorney to client and vice versa. (31:242) Clearly the court viewed the privilege very broadly and in terms of an agency right. That is to say, as viewed from outside the agency, the agency is the client of the Air Force attorney. However, in saying "the opinion of even the finest attorney...is no better than the information which his client provides," (31:252) it applies a philosophy which is just as appropriate to the individual as the client, as it is to the agency as the client. In other words, the rationale is preserved as easily when the commander is the personal

client of the SJA as it is when the Air Force is the client against third party litigants. In essence, the case, as well as FOIA and the implementing Air Force regulation, fails to define the relationship from within the Air Force. It does, however, at least provide a good rationale for the public not being the literal client of the staff judge advocate. Summarizing the reasoning for the restriction to public access to government documents, the court stated:

> Congress adopted exemption five in recognition of the merits of arguments from the executive branch that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl because the full and frank exchange of ideas on legal or policy matters would be impossible,...(otherwise) information of that type would not flow freely within the agency. (31:256)

The privilege is needed for the internal self-evaluation process, including discussions on the merits of past efforts, alternatives currently available, and recommendations as to future strategy. (31:257) Although the public is not the client, the public good must, of course, always be in the forefront of the attorney's thoughts and actions. A duty is owed to the American people, but that duty can be better fulfilled by having a privilege of some kind that prevents public disclosure. Further, the privilege within the government has some clear objectives--it avoids the premature disclosure of decisions which could be detrimental to that process. (31:257) It encourages the free exchange of ideas and allows the

official to be completely truthful with his lawyer. It encourages officials to seek legal advice knowing that their communications will be kept confidential. It also will likely foster voluntary compliance with regulatory rules and laws and thereby facilitate the effective administration of justice. (35:6)

The Military Rules of Evidence (MRE) provide little further assistance, defining "client" very broadly as "a person, public officer, corporation, association, organization, or other entity, either public or private..." (Emphasis added.) (32) Although a judge advocate could establish such a personal relationship for purposes of the rule, the MRE does not define the relationship between the commander and his staff judge advocate for other than military criminal evidence purposes. Likewise, Federal Rule of Evidence 501 fails to define the privilege beyond the limited intent of those rules.

We are searching for a rule to cover the everyday communications between the commander and his attorney. Repeatedly, authors fail to address the issue. For instance, although the ABA Model Rules of Professional Conduct declare that the organization is the client in corporations, and "the duty defined in this Rule applies to governmental organizations," it further states that "lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of

the client and proscribing the resulting obligations of such lawyers may be difficult in the government context." (2:133)

The privilege in that setting is indeed hard to define. A staff judge advocate is specifically provided to the commander as his personal legal advisor because the laws and regulations in today's Air Force are complex. It is in the best interest of the Air Force that the commander seeks legal advice early for an ever increasing spectrum of subjects. Should there be an internal privilege which excludes the agency; a policy which assumes that both the SJA and the commander act in good faith, that they contemplate no decision, possess no information, or speak no phrase against the interest of the Air Force? Would that turn the staff judge advocate into the commander's defense counsel and somehow lead to corruption? Is the lawyer all that smarter than the older and more experienced senior commander, an individual who usually has a much better view of the overall mission and Air Force perspective? If the lawyer works for the Air Force, can he serve two masters? If there was no privilege with the individual, would loyalty to the commander encourage the staff judge advocate to give more oral rather than written advice to avoid disclosure? On the other hand, would it encourage the SJA to put everything in memo form to cover himself? These are all issues that must be considered. Regardless of where the

line is drawn however, it is good to remember the overall purpose of such a privilege:

> In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases. (Emphasis in original.) (11:8)

Should these same principles apply to the military lawyer? Robert P. Lawry contends that:

> [t]he confidentiality rules are deliberately designed to allow the client to be able to disclose certain bad acts to his lawyer without fear of further disclosures. Why? So the lawyer can help the client to cut his losses, or make the best out of past mistakes. But government lawyers are said to be in the justice business. We do not want the government cutting its losses. If mistakes have been made in the past, we want those mistakes rectified so that justice can be done....Of course these platitudes are too simply stated. What they say may be entirely unacceptable to the vast majority of those who are actually on the firing line. Lawyers are placed in positions of trust on confidentiality, but with no guarantees to those consulting the lawyers that the trust reposed or the confidentialities enjoyed will be respected. We do not want that situation either. (25:69)

RULES FOR CORPORATIONS

Because of the structural similarities between corporate and governmental entities, both are essentially large and complex bureaucracies, and the fact that the theory of an

entity as a client started with corporate counsel, it is valuable to examine the scope of the attorney-client privilege in the corporation.

Over the years, the courts have developed two theories--the "control group test" and the "subject matter test." "Under the control group test, only those communications from employees in a position to control the operations of a corporation, or who played a considerable role in making the decision utilizing the requested legal advice, are protected as privileged." City of Philadelphia v. Westinghouse Electric Corp. (2:91-2202) Simply stated, communications from lower-level employees, i.e., those not in "control" of the corporation, were excluded under this theory. (2:91-2202)

The second test, the "subject matter test," protects all communications made "at the direction of ... superiors in the corporation and where the subject matter sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Harper & Row Publishers v. Decker. (2:91-2202)

In 1981, a unanimous United States Supreme Court decision in UpJohn Co. v. United States, 449 U.S. 383 (1981), clarified the issue somewhat by rejecting the "control group test." The Court found that this theory frustrated the purpose of the privilege by discouraging

communication of relevant information by employees of the corporation to attorneys seeking to render legal advice. (21:1022-1024) The Court did not specifically endorse the alternative "subject matter test," but emphasized that the process of uninhibited client communication in seeking legal advice is what merits protection, not the status of the communicator or the content of the communication. (2:91-2202) The "subject matter test" provides a more realistic and practical approach and focuses on the way business is conducted by America's corporations.

The case may be important in understanding the federal attorney's relationship with the government because it reiterates an assumption made by previous cases as well as a generation of ABA professional rules--that the corporate agency is the client and not the chief executive. Duty to the corporation, and indirectly to the shareholders, defines the privilege. It is this one overriding ideal, not seriously challenged after Watergate, that influences writers on the role of all government attorneys. It also is the greatest obstacle to creation of an SJA-commander privilege. Such thinking assumes (1) that the government attorney acts much like a corporate counsel, and (2) there is not much difference between a staff judge advocate, who is designated to assist a named commander, and the thousands of government attorneys fulfilling various diverse functions. Are these assumptions in fact true, and should

the SJA be treated as just another government lawyer? In the resolution of these issues lies the key to the problem.

THE 1969 AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY, THE 1973 FEDERAL ETHICAL CONSIDERATIONS, AND OPINION 73-1

On the heels of the development of the privilege in the corporate world came a series of bar rules and proclamations. The 1969 Model Code of Professional Responsibility was prepared by the American Bar Association and became effective on 1 January 1970. All Air Force judge advocates are governed by the Model Code and it has been adopted by each state bar (although with variations). Thus, it governs each judge advocate's professional conduct as a member of the state bar where admitted to practice. (35:1541) However, the Model Code is silent on the question of "who is the client of the government lawyer?" the Model Code is silent. (35:1541)

On 17 November 1973, the National Council of the Federal Bar Association attempted to fill the void by adopting nine Federal Ethical Considerations to supplement the Model Code. They provide specific guidance to federal government lawyers in general. (21:1011) (The Federal Ethical Considerations were subsequently adopted by the Department of Defense on 30 November 1981.) As a result, on 15 March 1973, The Committee on Professional Ethics of the Federal Bar

Association published Opinion 73-1 entitled, "The Government Client and Confidentiality."

The Federal Ethical Considerations and Opinion 73-1 state that the client of the "federally employed lawyer," and the one to whom professional responsibility is owed, is the department or agency in which he is employed, and not the individual employees. (35:4-1.4-2,5-1) The only exceptions are in those cases where the lawyer is specifically designated to represent another who is the subject of disciplinary, loyalty, or other personnel administration proceedings, or as defense counsel for court-martial matters or for civil legal assistance. In these limited situations, the communications between the individual client and attorney are secret and privileged. (35:4-4)

However, having said this, the situation is still not clear. Opinion 73-1 further states that while the client is the agency, the privilege also covers those charged with its administration in the conduct of public business. (12:72) Therefore, it can be argued that the Opinion recognizes some kind of individual protection. The relationship is a confidential one, but whether this relationship gives rise to an attorney-client privilege the Opinion does not precisely say. (12:72-73) The overall guidance in Opinion 73-1 seems to provide that Air Force judge advocates owe their professional allegiance to the Air Force, not to the

individuals for whom they might work, and specifically not to the public as a client. But it is not clear whether the primarily civilian authors of the Opinion recognized and appreciated the special relationship a staff judge advocate must have to his commander. It is undoubtedly a unique relationship not shared by the thousands of other federal lawyers. This relationship will be discussed later.

1983 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

In an effort to update and improve the 1969 Model Code, the American Bar Association released a proposed draft of new rules in January 1980. Following extensive discussion, debate, and amendment, the new Model Rules of Professional Conduct were promulgated by the ABA in August 1983. The Model Rules are intended to replace the Model Code, but must be adopted by the individual bar associations. Only nine bar associations have adopted these rules to date. (2:1-3)

The revisions attempt to change the old Model Code provisions, which were thought to be overly restrictive and inconsistent with the public interest, and to clarify ambiguities. A more significant purpose was to fill voids in the Code concerning the practice of the business lawyer and the role and obligations of corporate counsel. (24:1-3)

Rule 1.13, entitled "Organization as Client," is the most important new provision concerning the issue, having no

counterpart in the Model Code. Ethical Consideration 5-18 to the Model Rules states that a lawyer employed by a corporation owes his allegiance to the entity and not to a stockholder, director, or employee; but it does not otherwise give further specific guidance. Rule 1.13(a) goes on to state: "A Lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." (2:1-134) A "constituent" is something other than a "client."

This organization or "entity" concept has developed from two substantive branches of law. First, it is derived from the basic legal concept of the corporation; it is an organization having a separate juristic person (or life) capable of entering into relationships and being bound legally. Second, agency principles define the relationship between principal and agent. A lawyer is considered an agent or loyal servant of the corporation. The lawyer's obligations as such run to the principal, i.e., to the organization, and not to individual officials of the organization who are actually, like the lawyer, only other agents of the corporation. (2:91-2003)

The Comments to Rule 1.13, which were adopted by the ABA House of Delegates along with the Rules, clarify that the word "constituents" refers to officers, directors, employees, and shareholders. "When one of the constituents of an organizational client communicates with the

organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. which covers the attorney-client privilege." (2:01-132) The Comments further clarify the situation by saying, "This does not mean, however, that constituents of an organizational client are the clients of the lawyer." (2:01-132)

Clearly then, in the corporate setting, the organization under these rules is the client of the attorney. Applying this to the Air Force setting, it can be argued that confidential communications between the commander and his staff judge advocate would be protected by the attorney-client privilege with respect to a third party outside the Air Force seeking information, as FOIA intends to achieve, but within the Air Force the communication is not necessarily protected. It would then be at least a confidence or secret of the Air Force, but the staff judge advocate-commander communication may be disclosed by the lawyer to higher command, i.e., other constituents who have a need to know. (2:91-2201) It should be remembered, however, that the SJA-commander relationship is not specifically addressed, or even intended to be covered by this broad guidance, and that the rules have not been universally adopted. Presumably the military may still make specific regulations further defining relationships within the agency.

The remainder of Rule 1.13 attempts to provide guidance to the corporate lawyer on when and how to disclose confidences made to him by constituents of the corporate organizational client. In some cases, for example, the lawyer may have to refer matters to the organization's highest authority, such as the board of directors. In situations where it becomes apparent to the lawyer that the agency's interests are adverse to the constituent's with whom the lawyer is dealing, Rule 1.13(d) requires the lawyer to explain the identity of his client (i.e., the agency) to the official seeking legal advice. (2:1-131-132) This Miranda-like rights advisement portends a chilling effect on the SJA-commander relationship and will be addressed in this paper.

PROPOSED RULES OF PROFESSIONAL CONDUCT FOR THE UNIFORMED SERVICES

In December 1984, a working group of judge advocates from the Air Force, Army, Coast Guard, Marine Corps, and Navy attempted to draft a proposed set of model rules of professional conduct that would be acceptable to each service. They conducted a systematic review of the ABA 1983 Model Rules of Professional Conduct; their goal being to maintain the structure and intent of the ABA rules, yet modify them to reflect the unique aspects of the practice of law in the military. The draft rules were circulated to the

Judge Advocates General of the various services for review and comment in June 1985.

Rule 1.13 of the proposal, entitled " Organization as Client," closely parallels the 1983 ABA Model Rules. Rule 1.13 (a) provides: "A lawyer employed or retained by, assigned to, or otherwise acting in an advisory capacity for an organization represents the organization acting through its duly authorized constituents." (10:24) However, subparagraph 1.13(e)(2) provides what appears to be a rather revolutionary exception to this well-known principle: "A lawyer assigned to act as staff judge advocate, legal advisor, or attorney for a specific command or unit within an organization may establish a lawyer-client relationship with the commander or other officials of that unit in order to fulfill that assignment." (Emphasis added.) (10:25) The Comments to Rule 1.13(e)(2) leave no doubt as to its intent: "Paragraph (e)(2) extends the lawyer-client relationship to staff judge advocates, command legal advisors, and other lawyers assigned to provide legal advice to commanders and other individuals who require such representation. This Rule encourages officials to invite and consider the views of counsel and thereby tends to prevent adoption of illegal policies or actions." (10:27)

Does this subparagraph mean what it says? In a section defining the agency as the client, such an exception to the well-recognized rule could easily be overlooked. It appears

as a subparagraph in a section entitled "Organization as Client," which further muddies the water. Does the SJA, unlike other DOD lawyers, have two clients, the Air Force and the commander? If so, which takes precedent in a particular conflict such as posed at the beginning of this paper? It would seem that if this SJA-commander privilege is to be adopted, more specific guidance should be provided. This can most efficiently be accomplished by regulation.

THE ETHICAL DILEMMA

So where does the staff judge advocate stand after all this? If the proposed uniformed services rules creating a privilege with the commander are not adopted, the SJA is precisely in the center of an ethical dilemma. Without a stated rule, the SJA will continue to operate without guidance. With a stated policy of no privilege, he will be squarely between a perceived duty to the Air Force and loyalty to his commander. We will recap the competing considerations.

As previously demonstrated, the weight of authority, and in the opinion of most writers and scholars who have studied the issue, including the American Bar Association, the client of the corporate attorney would be the organization and not the individual executives. The 1983 ABA Model Rules of Professional Conduct clearly reflect this view. Opinion 73-1 applies this concept to the federally employed lawyer,

indicating that the lawyer's loyalty and professional obligation and responsibility is to the federal agency. The Professional Ethics Committee of the Federal Bar Association, author of Opinion 73-1, recognizes that the government lawyer assumes a public trust and may not stand by and allow officials to engage in criminal conduct, and possibly even gross negligence. But the committee purposely fails to draw the line or provide further guidance. (12:74)

The competing view, at least the apparent intent of the uniformed services proposal, focuses on the unique role and status of the commander in the military and the purpose of the attorney-client privilege. "The entire concept of command presupposes that the commander bears full responsibility for the decisions he or she makes and for the consequences of those decisions. ...[T]he command concept must be premised on the freedom to make mistakes in order that command initiative and authority are not destroyed." (16:20-21) Military officers become commanders of large organizations only after advancing through a promotion system based on integrity and devotion to duty and loyalty to both the Air Force and their country. They have had to prove themselves worthy of trust; the position of commander is one of awesome authority and responsibility. The Air Force should trust them by providing a privilege between them and their attorneys.

We agree with this view. Without dispute, the central purpose of the attorney-client privilege is to encourage full and frank communications between the client and his lawyer. The staff judge advocate then is a vital member of the commander's staff. For a commander to make informed decisions, he must be able to have full and open discourse with his lawyer. They must be reasonably certain of where the staff judge advocate's responsibilities lie and what communications are protected from disclosure--and this certainty must be based on loyalty to the commander. This loyalty is not unlike the allegiance all subordinates must bear to their commanders, and it need not mean a compromise of one's duty to serve either the Air Force or the American people.

Where should the Air Force then go from here? There are three possible solutions. The first, which we advocate, is to reinforce the proposed uniformed service rule creating a special relationship between the commander and his staff judge advocate. Their communications would be privileged, with only limited exceptions.

The second is to leave things the way they are now--and say or do nothing. Most commanders would continue to think their conversations with their lawyers are privileged, most staff judge advocates would not be sure, and dealings with higher headquarters on specific controversial issues would be handled as they are today, on an individual basis,

between the senior, experienced staff judge advocate at the major command or numbered air force and the base level staff judge advocate.

The third is to formally adopt the corporate approach espoused by the 1983 ABA Model Rules--that the organization and not the commander is the client--but tell everyone, both staff judge advocates and commanders, what the ground rules are.

OPTION ONE

The strongest advocate of the first option of having an almost absolute SJA-commander privilege has been Captain Lawrence A. Gaydos, published in United States Department of the Army Pamphlet 27-50-128. Captain Gaydos points out that Army Regulation 27-1, paragraph 14(a), states that the staff judge advocate is "primarily a staff officer on the staff of his own commander, is responsible only to him, and is fully subject to his command just as any other member of the command. Technical guidance through technical channels is designed only to assist the judge advocate to be a more effective staff officer to his commander." (Emphasis in original.) (16:19) Further, a previous Army Staff Judge Advocate Handbook stated that "a commander expects full cooperation from his staff judge advocate and will expect his support of all decisions, even though another course of action or solution was recommended...[he] does want a legal

advisor whose loyalty is unquestioned." (8) Captain Gaydos argues convincingly that such a privilege would serve the public interest, encourage the commander to correct mistakes and seek legal solutions to problems, and place the decision- making responsibility squarely where it belongs--with the commander. (16:20) Finally, he points out that the staff judge advocate rarely plays a major role in exposing command improprieties and that there is little chance of commanders creating a "zone of silence" by funneling information through the attorney, a subject of some concern to writers on the subject in the post-Watergate years. (16:22) Captain Gaydos' only exception to the otherwise absolute privilege would be a mandatory disclosure when the staff judge advocate is convinced beyond a reasonable doubt that a crime or fraud was about to be perpetrated. (16:20) We would only add a provision requiring mandatory disclosure to higher authorities of a situation which would adversely affect the confidence of the public in the integrity of the government.

As indicated above, we agree with the conclusions reached by Gaydos. When the commander and his staff judge advocate close their door to talk, discussions between them should be with no holds barred. This special relationship deserves special treatment. As stated, we believe only in the very rarest circumstances, involving on-going or future injuries or embarrassment, crimes, or fraud, should the SJA

elect to make an exception to the privilege. If the SJA is unable to convince the commander to refrain from taking such action, he should attempt to convince the commander to inform higher officials of the problem, in order to both receive guidance and assistance. We believe that in the vast majority of cases that will in fact occur. Certainly in the case presented at the beginning of this paper, the commander would no doubt want to cooperate fully with the investigation team from higher headquarters, ordering all files be made available. However, the decision should be the commander's and not the staff judge advocate's. The commander looks to his SJA's counseling as one of his strongest supports. But should the SJA's opinion usurp the decision which must be made by the commander? We think only as to future misconduct that is obviously detrimental to Air Force interests. In other words, the Air Force should take the staff judge advocate off the horns of the dilemma.

Returning to those ambiguous Federal Ethical Considerations, "sound policy favors encouraging government officials to invite and consider the views of counsel. This tends to prevent the adoption of illegal policies...the failure of lawyers to respect official and proper confidences discourages this desirable resort to them." (23:1544) On the other hand, we disagree with the author who writes, "the final conclusion concerning whether to disclose or not rests with the government lawyer." (25:70)

The decision to disclose should be made by the commander, except in the most unlikely of circumstance where the commander refuses to abstain from future intended misconduct.

Furthermore, historically we find support for the proposition that a commander-SJA privilege fulfills the need for an independent and autonomous command structure, particularly in time of war. Within the military justice system the commander performs an important quasi-judicial and judicial role as both convening and reviewing authority for courts-martial and nonjudicial punishment proceedings. The Uniform Code of Military Justice was formulated with the intent to allow commanders to function, at least to some degree, without direct supervision. As stated, this is particularly necessary in time of armed conflict when discipline must be imposed in an expedient manner and with a minimum disruption of the mission. We find that a communication privilege is consistent with this philosophy and helps promote the concept of an independent decision maker.

Finally, we conclude that not only are the commander and the commander's attorney aided in their individual attempts to function by the existence of a privilege, but also that no information will in fact be withheld from higher authority. Staff judge advocates and commanders will still realize the necessity to elevate information, and they will

do exactly that. The ultimate benefit of a privilege will be to guarantee that commanders and not staff officers will decide how and when to release information. If commanders believe that it is best to do it through judge advocate channels, then that's how it will occur. The privilege will prevent the premature release of information and will guarantee that the commander is in essence the release authority for very sensitive information and will make the decision on its release. This makes sense, since the commander is the one individual accountable for the command and the one individual most likely to know all of the details of the problem. In a typical example, the commander may want to call or send a message to higher headquarters, or he may direct the SJA to talk to another staff agency possessing more details before releasing the information, or the commander may prefer that another staff agency release the information. We feel this is a prerogative of command and a privilege will do nothing but reenforce this policy. Bear in mind, however, only a very small percentage of that information is received by the SJA on a routine basis--only that information so sensitive as to be viewed by the staff judge advocate as intended by the commander to be privileged.

A privilege as we have envisioned is not wholly without problems, for it requires an assumption of responsibility at the lowest level. It would not exist between staff agencies

or subordinate squadron commanders and staff judge advocates. They would need to know that. Also, conflicts might still occur with the SJA typically serving both base and wing commanders, and possibly even a division commander on that same base. Could a privilege put the SJA between hostile base and wing commanders? The Air Force has created this potential problem by designating the staff judge advocate as the servicing attorney at the typical base. We believe there is no reason to change this approach and that staff judge advocates can work within these constraints, even with a privilege with one of his "clients." To be frank, there is no appropriate resolution to this conflict except that the benefits of the privilege outweigh the problems. Certainly, we do not advocate a privilege with either the base or wing commander to the exclusion of the other.

One last problem with option one needs to be addressed. As stated earlier, on 16 November 1981, Department of Defense General Counsel William H. Taft, IV, published a memorandum establishing a Committee on Professional Responsibilities for the Office of General Counsel, Department of Defense, and for the Defense Legal Services Agency. That memorandum at FEC 4-2 and FEC 5-1 echoes the view pronounced by the American Bar Association Code of Profeasional Responsibility that the federal lawyer is professionally responsible to the agency concerned and not

the individual employee. We believe that creation of a commander-SJA privilege within the military is not inconsistent with the general rule that federal lawyers serve their agencies. It would be just one more exception, much like the privilege existing between federal attorneys and their individual clients when serving as designated defense counsel or as legal assistance advisors. However, the Judge Advocate General may wish to coordinate a policy decision with the DOD General Counsel before creation of an SJA-commander privilege.

OPTION TWO

The second option is to preserve the status quo; in other words, to take the position that the system works pretty well now so let's not try to fix it. Perhaps another way to reach this same conclusion is to say that option one is not acceptable because all Air Force members, as a matter of policy, must owe their loyalty to the service. Yet a declared policy to that effect would be destructive to the SJA-commander relationship. Commanders consult their attorneys when they have confidence in their maturity and judgment. Staff judge advocates seek advice from higher headquarters and forward information without having a regulation stating that their loyalty must lie somewhere other than with their commander. That is not to say something wouldn't be gained by letting everyone know the

rules of the game. However, it is far better to let our SJAs and commanders work things out as events and conditions require.

This solution of allowing the staff judge advocate to "play it by ear" is not really all that unusual in the legal profession. Professor Geoffrey Hazard of Yale Law School, points out that lawyers often serve multiple clients. Sometimes these clients have differing interests and perspectives. It is then the attorney must act as "the lawyer for the situation." (20:58)

It was just such a theory that emerged during the confirmation hearings for Justice of the Supreme Court Louis D. Brandeis. He was accused of unprofessional conduct in his previous private practice by representing clients with conflicting interests. Specifically, he had represented a family business after a falling out of family members, had put together a bargain between parties to a business deal, and had mediated and adjusted interests between owners and creditors of a floundering business. Brandeis very adequately defended his actions by arguing that sometimes the practicioner should not be the lawyer for just one of the parties to the exclusion of the others. He needs to be a lawyer for the situation. Lawyers act as informal trustees for second and third generation members of inherited property. They act as intermediaries between corporate chief executives and other board directors in the

face of policy differences. They mediate differences between divisions within a corporation. (20:60-64) The list goes on and on. The answer is not to have the lawyer withdraw from the situation, or to read "Miranda" rights to one party and declare loyalty to the other. As should be obvious, "loyalty to client, like loyalty to country, may take different forms." (20:64)

In the case of the SJA-commander relationship, it should take the form of continued service and loyalty to the commander while working the problem. We believe this is the next best approach if option one is not adopted. If subordinates cannot be permitted to have a privilege that may on a rare occasion inhibit the upward movement of information, there at least should be confidence in them to make the right decision based on their maturity, education, experience, and rapport with their commander. The individual should act as he sees necessary. Our very best people are selected to be staff judge advocates; they need to be trusted and feel confident in making the right decision without trying to provide further specific guidance. In any case, it may be too difficult to provide specific guidance to answer every ethical dilemma. Again, Professor Geoffrey Hazard states:

> Since the profession's rules of ethics do not conceive of this possibility [of a conflict], they do not offer guidance as to what affirmative courses of action might be appropriate under various circumstances. It is difficult to imagine

> a set of prescriptions that could definitively offer much guidance, any more than definitive prescriptions can be supplied for resolving the moral dilemmas of everyday life. If that is so, the lawyer has to let his judgment, perhaps one might say his conscience, be his guide. This is to say, however, that he is inevitably a moral actor in his professional work. He must make choices on his own and cannot lay off the responsibility for them on duty to client. (20:57)

OPTION THREE

The third option postulated, i.e., have no privilege and tell the staff judge advocate and commander what the rule is, could be counterproductive. Some commanders might tend to withhold selective information from their staff judge advocates or at least not consult with them as often as they should. Even more likely, the younger staff judge advocate might feel obligated to elevate to headquarters every error, mistake, and oversight of command, losing sight of loyalty to his commander, in an effort to serve his Air Force "client." Worse, he could give the very "Miranda" warning advocated by the ABA Model Rules. Nothing would more permanently cool the SJA-commander relationship than the SJA saying, "tell me the problem, but of course I'm going to have to phone headquarters as soon as I leave here." The net effect could be a reluctance or hesitancy on the part of some commanders to consult their staff judge advocates at the very moment they need their guidance and input most! It

would not help the Air Force solve a problem, but would only preserve a secret.

Finally, there is the distinct possibility that if staff judge advocates found it ethically abhorrent to comply with a directive that undermines their loyalty and responsibility to their commander, SJAs may be found elevating no more information than occurs now. In other words, dictating a policy doesn't mean it will necessarily be followed if it is viewed to be inappropriate to the needs of command. It only puts the SJA further upon the horns of the dilemma, this time with the added burden on his conscience that his actions may be in violation of Air Force policy.

Requiring disclosure, at first glance, appears to ease the task of the SJA. But on closer scrutiny, just the reverse is true. The best answer is not for the attorney to wash his hands of the commander's problem, to step back and serve no one. It is good to remember that most staff judge advocates will still see a duty to help that individual he has on many occasions said, "What's the problem, I'm here to help."

IMPLEMENTATION

If the first option is adopted, as here recommended, Air Force Regulation 110-23, paragraph 5d should be added as follows:

> The designated or acting staff judge advocate to a command is a unique position within the Air

> Force. Because of the special relationship this individual has with both his convening authority and to the commander of the unit to which assigned, communications between the staff judge advocate and these two individuals will normally be privileged. However, notwithstanding this privilege, the staff judge advocate should immediately alert higher authority of any potential crime, fraud, or other action against the Air Force which would adversely affect the confidence of the public in the integrity of the Government, whether or not the information is derived from the commander.

It is further recommended that the proposed Rules of Professional Conduct for the Uniformed Services, paragraph 1.13(e)(2) be amended to read:

> A lawyer assigned to act as staff judge advocate, legal advisor, or attorney for a specific command or unit within an organization may establish a lawyer-client relationship with the convening authority or commander of the unit to which assigned in order to fulfill that assignment. This is an exception to the general rule that the client of the judge advocate is the organization.

Note that the words "commander or other official of that unit" have been deleted from the proposal and replaced with the words "convening authority or commander of the unit to which assigned." The privilege should not be extended to subordinate commanders, i.e., squadron commanders, or to other officials such as heads of staff agencies. However, the privilege should extend to the convening authority, at the base level usually the base commander, and to the senior commander of the unit to which the judge advocate is assigned, again at the base level usually the wing commander. At the numbered air force and major commmand

levels, only the commander would fit the definition. The last sentence is added to clarify that this subparagraph, is in fact, intended to be an exception to the general rule of the paragraph.

If this option is deemed to be not acceptable, it is recommended that no specific policy be set down. In such a case, subparagraph 1.13(e)(2) of the proposed Rules of Professional Conduct for the Uniformed Services should be deleted entirely. Also, AFR 110-22, paragraph 5c could be added to state:

> In situations other than legal assistance or when acting in the role of defense counsel, the client of the Air Force judge advocate is the Air Force. In that context, the designated staff judge advocate has a special relationship with his commander. The staff judge advocate should rely on his experience, maturity, and good judgment when determining what information should be provided higher authorities.

The third option, which is not advocated in this paper, would again require the deletion of subparagraph 1.13(e)(2) to the proposed Rules of Professional Conduct for the Uniformed Services, but would require the following to be added to AFR 110-22, paragraph 5c:

> Other than in the context of legal assistance and advice rendered by defense counsel, there is no concept such as privileged communications within the Air Force. The client for all Air Force judge advocates is the Air Force itself. For further information, see Rules of Professional Conduct for the Uniformed Services, Rule 1.13, entitled "Organization as Client.

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